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No. 06-

IN THE
Supreme Court of the United States

RODERICK KEITH MCDONALD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision—permitting prosecutors to manipulate the rules for assigning criminal cases so as to have a case against a prominent African-American politician tried in a foreign venue where the jury pool was virtually devoid of African-Americans—violates the defendant's fundamental right to due process of law, in conflict with decisions from the Second and Tenth Circuits, as well as the Louisiana and New Mexico Supreme Courts.

2. Whether the Ninth Circuit departed from fundamental due process principles, as articulated by this Court in *Carella v. California*, 491 U.S. 263 (1989), and *Connecticut v. Johnson*, 460 U.S. 73 (1983), by sustaining a conviction based on a jury instruction that failed to include all the elements of the crime charged, thereby permitting a conviction where the government failed to prove every element of the offense, in conflict with every other circuit to consider the issue.

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INTRODUCTION

This case presents two fundamental questions in our criminal justice system: *First*, whether the government can racially gerrymander a defendant's case into a profoundly less diverse forum, in contravention of established rules and procedures for charging cases; *second*, whether a conviction may be sustained where the jury instruction failed to include all elements of the crime charged. The Ninth Circuit, per Judges Pregerson, Alarcón, and Bright (sitting by designation), answered both questions in the affirmative, thereby deepening a circuit split as to the first and contravening this Court's settled precedents as to the second.

1. In this case, the government manipulated the procedures for assigning criminal cases to a particular division within a judicial district so as to ensure that Roderick Keith McDonald—a prominent, well-respected African-American politician—would be tried in Orange County, where the prosecution was assured of obtaining a jury pool with less than 2% African-Americans. The allegations against Mr. McDonald, who served the citizens of Los Angeles County for over a decade, arise *entirely* from activities and conduct occurring in Los Angeles County. Indeed, only two paragraphs of the fifty-seven paragraph indictment even mention Orange County, and they are utterly contrived—describing activities of a *third party* that are not even part of an alleged crime. Simply put, the government's basis for trying Mr. McDonald in Orange County is specious at best. Tellingly, Mr. McDonald's alleged co-conspirators were charged in Los Angeles County. He alone was singled out for different treatment. To

this day the government has failed to offer a good-faith explanation for charging Mr. McDonald in Orange County. This case, thus, raises fundamental questions of due process. In affirming, the Ninth Circuit upset the constitutionally sensitive balance between the discretion of the prosecutor and the defendant's due process rights under the Fifth Amendment. Because the decision below conflicts with decisions of the Second and Tenth Circuits, and the Louisiana Supreme Court, which recognize the due process violation that can arise from the government's manipulation of criminal case assignments, this Court should grant review. *See Francolino v. Kuhlman*, 365 F.3d 137 (2d Cir.), *cert. denied*, 543 U.S. 872 (2004); *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000); *Louisiana v. Simpson*, 551 So. 2d 1303 (La. 1989).

But more is at work in the government's obvious manipulation of venue selection in this case. The choice-of-venue gerrymandering raises heightened structural constitutional concerns because the decision to maneuver this case into Orange County virtually guaranteed that no African-Americans would sit on Mr. McDonald's jury. This issue was first presented to (but not passed on by) this Court in *Mallett v. Missouri*, 494 U.S. 1009 (1990); however, since then the lower courts have divided on the issue. Like the court below, the Eighth Circuit has rejected the argument that racially-influenced venue selection violates due process, *see Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998), whereas the courts in *New Mexico v. House*, 978 P.2d 967, 993-94 (N.M. 1999), and *Osmulski v. Becze*, 638 N.E.2d 828, 832-34 (Ind. Ct. App. 1994), have held precisely the opposite. *See also Tyson v. Trigg*, 50 F.3d 436, 442

(7th Cir. 1995) (Posner, C.J.). The Court should grant certiorari to resolve the conflict with respect to the due process implications of the manipulation of criminal case assignments, particularly where issues of race are involved.

2. At trial, over Petitioner's objection, the district court issued jury instructions for the conspiracy to extort charge that omitted the key element of conspiracy—namely, that the object of the conspiracy was to obtain money from persons *other* than the co-conspirators. The government conceded below that the jury instructions were not "a model of clarity," U.S. 9th Cir. Br. 32, and the Ninth Circuit agreed that the "challenged instruction that listed the elements of the offense *omitted a critical word: 'another.'*" App. 3a (emphasis added). That should have been the end of the matter. Settled case law from this Court and every circuit confirms that where an element of the charged offense is omitted from the jury instructions, and the omission is not otherwise harmless, the conviction cannot stand as a matter of due process. *See, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam); *Connecticut v. Johnson*, 460 U.S. 73, 79-80 (1983).

That settled rule is not the standard in the Ninth Circuit. Judges Pregerson, Alarcón, and Bright attempted to rescue the otherwise doomed instruction by relying on the separately issued instruction for "extortion under color of official right." The problem for the government, however, is that for purposes of the conspiracy charge, *Mr. McDonald was not the person allegedly committing extortion under color of official right.* That aspect of the instruction applied to the alleged co-conspirators,

members of the Carson City Council, not Mr. McDonald. In other words, no matter how cast, the Ninth Circuit permitted a conviction for a conspiracy if the jury found the alleged co-conspirators intended to obtain money from *Petitioner himself* (an inference they could have drawn from the record). That is not the law and the Ninth Circuit's determination that this critical mistake was cured by another, wholly irrelevant jury instruction, raises profound issues of due process.

In sum, the ruling below obliterates the careful scheme of appellate oversight of criminal jury verdicts that this Court has consistently demanded. Given there is a "reasonable likelihood" that the jury applied the jury instructions in a manner that violated the Constitution, *see Middleman v. McNeil*, 541 U.S. 433, 437 (2004), the Court should grant certiorari to address the Ninth Circuit's radical departure from this Court's precedents (as well as the well-traveled path of other courts of appeals), and vindicate its own carefully articulated principles of criminal trial practice. Alternatively, this issue is appropriate for summary reversal.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 178 Fed. Appx. 643, and reprinted in the Appendix (App.) at 1-6a. The Ninth Circuit's unreported order denying the petition for panel rehearing and suggestion for rehearing *en banc* is reprinted at App. 7a.

JURISDICTION

The Ninth Circuit entered judgment on April 25, 2006. Petitioner timely filed a petition for panel

rehearing and suggestion for rehearing *en banc*, which was denied on June 21, 2006. On September 12, 2006, Justice Kennedy granted Petitioner's application to extend the time within which to file a petition for a writ of certiorari to October 19, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law

18 U.S.C. § 1951 provides, in pertinent part:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

A. Background

Petitioner Roderick Keith McDonald is a public servant who comes from a family with a proud history of service to the people of Los Angeles. The son of a current member of the United States Congress, Mr. McDonald became active in politics at a young age and has continued that family tradition of service. In 1994, he was first elected by his peers to serve on the West Basin Municipal Water District ("Municipal District"), the local government agency responsible for providing water and waste water

services for all of Los Angeles County. Petitioner's 9th Cir. Excerpts of Record ("E.R.") at 73. He was reelected in 1998 and again in 2002. *Id.*

In 2003, Mr. McDonald was indicted for allegedly engaging in various acts of political corruption in Los Angeles County. E.R. 1-23. He was one of several officials indicted, including three alleged co-conspirators serving on the Carson City Council. The government failed to secure a conviction on the majority of counts. E.R. 195.

The government did not dispute that 20 of the 21 counts in the indictment concerned only Los Angeles County, where Mr. McDonald lived, worked, and served on the Municipal Board. E.R. 29. In the remaining count, the government accused Mr. McDonald of conspiring with three members of the Carson City Council to commit extortion in connection with a contract for public bus services in violation of the Hobbs Act, 18 U.S.C. § 1951. App. 2a; E.R. 18-19. (Carson City is located in Los Angeles County.)

Although Mr. McDonald is a citizen and former public official in Los Angeles County, and although the government charged him with criminal acts occurring in and arising from Los Angeles County, it did not indict or try him in the Western Division of the U.S. District Court for the Central District of California (which encompasses Los Angeles County). App. 2a; E.R. 1. Rather, the government intentionally assigned McDonald's case to the Southern Division, which consists entirely of Orange County. *See* 28 U.S.C. § 84(c). According to the United States Census Bureau, "Black persons" represent only 1.9% of the citizens of Orange County.

See U.S. Census Bureau, *California QuickFacts*, available at <http://quickfacts.census.gov/qfd/states/06/06059.html>. And, unsurprisingly, there were in fact no African-Americans on Mr. McDonald's jury.

Under the Central District of California's general orders, a criminal indictment or information may only be assigned to the Southern Division "if at least one of the crimes charged, or any party thereof, is alleged to have been committed within the Southern Division." E.R. 25. The government's sole basis for channeling this case to the Southern Division is found in the conspiracy count. However, the two paragraphs of the indictment referencing Orange County merely describe the non-criminal business activities of a *non-party*, Transportation Concepts. *See* E.R. 20. Those two paragraphs alleged that an individual located in Irvine faxed bus rate information to Mr. McDonald and drafted a consulting agreement. These supposedly "overt acts" were not actually a part of the alleged crime of conspiracy to violate the Hobbs Act.

Tellingly, Mr. McDonald's purported co-conspirators *in that very alleged conspiracy* were indicted in the Western Division, rather than the Southern Division. Specifically, Carson City Council member Manuel Ontal was indicted in the Western Division for his role in the same alleged extortion conspiracy. E.R. 26, 33. Moreover, when Councilman Ontal was indicted, the government filed a related-case notice to a previous case filed in the Western Division against yet another Council member, virtually ensuring that the case would remain in the Western Division. However, the federal prosecutors conspicuously avoided filing a

similar notice in this case, which would have likely prompted a transfer to the same judge in the Western Division. *See* E.R. 28-30, 33-35, 121.

B. The District Court Proceedings

Petitioner sought a venue transfer from the Southern Division to the Western Division. App. 2a; E.R. 25. The government vigorously opposed the motion. E.R. 28-31. The government represented to the district court that the conspiracy scheme "involved the victimization of Transportation Concepts," and that Mr. McDonald "was to act as the conduit for funneling the extorted payments from Transportation Concepts to the elected officials" on the Carson City Council. E.R. 29. Specifically, the government argued that Petitioner "would not have been able to accomplish his criminal design" without the faxing of rate information, and that Petitioner "caused" a Transportation Concepts employee to draft the written consulting agreement. E.R. 29-30. The district court denied Mr. McDonald's motion. App. 2a; E.R. 36.

At trial, however, the evidence offered by the Transportation Concepts employee completely contradicted the government's theory. *See, e.g.*, E.R. 100-103. Indeed, the government does not now dispute that the two paragraphs relied on as the sole basis for trying Mr. McDonald in Orange County describe ordinary business activities of a *third party* which was not a member of the alleged Hobbs Act conspiracy. *See* U.S. 9th Cir. Br. 21-22. In short, the government relied exclusively on the non-criminal conduct of a non-conspirator to establish venue.

The government also proposed the following jury instruction regarding the charge of conspiracy under color of official right:

> "First, a co-conspirator was a Carson City Council member;
>
> "Second, the defendant or a co-conspirator intended to obtain money which defendant or a co-conspirator knew defendant or co-conspirator was not entitled to;
>
> "Third, the defendant or a co-conspirator knew that the money would be given in return for taking some official action; and
>
> "Fourth, commerce or the movement of an article or commodity in commerce from one state to another would have been affected in some way." E.R. 173 (Instruction 22).

Petitioner objected to this instruction and argued that it permitted the jury to convict him based only on evidence that he agreed to bribe the Carson City Council members—not that he (or his alleged co-conspirators) actually obtained a benefit from *another* party. *See* E.R. 38, 40, 148-49. He proposed an alternative instruction that made clear that *a person cannot conspire to extort money from himself or his co-conspirators.* App. 3a; E.R. 150-151. Petitioner's proposed jury instruction made clear that the jury must find that "the members of the conspiracy conspired to obtain money from another person or entity when they knew they were not entitled to that money." E.R. 150. The district court, however, gave the erroneous instruction with no clarification. E.R. 161, 173.

At the same time, the district court issued an instruction regarding the substantive offense of extortion under official color. U.S. 9th Cir. Excerpts of Record ("U.S.E.R.") at 1455. That instruction stated: "The phrase extortion under color of official right means a person's use of the power and authority of the public office he occupies to obtain money or something of value from another to which that person is not entitled." *Id.* However, for purposes of the conspiracy charge and this instruction, Mr. McDonald was *not* the person charged with extortion under color of official right. Rather, he was merely alleged to be a conspirator with members of the Carson City Council, who in turn were alleged to have acted "under color of official right." *See* U.S.E.R. 1186.[1]

Mr. McDonald was convicted by an Orange County jury of 10 of the 21 counts in the indictment, including the Hobbs Act conspiracy count. App. 1-2a. He moved for a new trial, renewing his claim that the government's manipulation of the case assignment system in order to ensure that the case would be tried outside of Los Angeles County violated his due process rights. E.R. 174-79. The district court denied the motion. E.R. 181-82.

C. The Ninth Circuit Proceedings

Petitioner appealed to the Ninth Circuit, arguing, *inter alia*, that the government's manipulation of the case assignment out of Los Angeles County and the

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[1] The jurors may have been confused on this point as well, because other charges against Mr. McDonald *did* concern his role as a public official.

use of a jury instruction that omitted an element of the offense violated his due process rights. *See* App. 1-3a.

Judges Pregerson, Alarcón, and Bright (sitting by designation) affirmed. App. 6a. The panel rejected Mr. McDonald's due process claim arising out of the manipulation of the case assignment on the basis that Petitioner "failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division." App. 2-3a. The panel ignored the argument that the government's gerrymandering constituted structural constitutional error.[2]

Turning to the incomplete jury instruction for the conspiracy to commit extortion charge, the panel acknowledged that it "failed to specify that the defendant must have taken money from 'another person' outside of the conspiracy." App. 3a. However, while holding that the "challenged instruction that listed the elements of the offense *omitted a critical word: 'another,'*" App. 3a (emphasis added), the panel affirmed the conviction solely on

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[2] The panel suggested in passing that Mr. McDonald had failed to raise his claim properly in the district court. App. 3a. That assertion fails on the face of the record. To be sure, Petitioner did not specifically cite *Batson v. Kentucky*, 476 U.S. 79 (1986), which addressed issues analogous to those presented here; however, he clearly raised the issue of structural constitutional error, as the district court itself acknowledged in denying his motion for a new trial. E.R. 181. In any event, there is no dispute that the questions presented were both "presented to and passed on" by the Ninth Circuit. *United States v. Williams*, 504 U.S. 36, 41-42 (1992).

the basis of the instruction defining the crime of "extortion under color of official right," even though (for purposes of the conspiracy charge), it was Mr. McDonald's *co-conspirators*, not Mr. McDonald, who stood accused of "extortion under color of official right." App. 3a.

Mr. McDonald filed a timely petition for panel rehearing and rehearing *en banc*, which the Ninth Circuit denied. App. 7a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Violated Fundamental Principles Of Due Process And Deepened A Circuit Split By Permitting The Government To Manipulate The Rules For Assigning Criminal Cases So As To Gerrymander This Case Into An Unfavorable Forum.

The decision of Judges Pregerson, Alarcón, and Bright violates fundamental principles of due process and deepens an important circuit split. The decision allows federal prosecutors to manipulate the case assignment system so that an African-American defendant can be gerrymandered into a jurisdiction in which the jury pool is predominately white. In so doing, the Ninth Circuit has upset the constitutionally sensitive balance between prosecutorial discretion and the Fifth Amendment right of defendants to demand that the government play by the rules.

To be sure, "[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). However, as a

different panel of the Ninth Circuit has recognized, although a defendant "has no right to any particular procedure for the selection of the judge [or venue] ... he is entitled to have that decision made in a manner free from bias *or the desire to influence the outcome of the proceedings.*" *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (Kozinski, J.) (emphasis added). In other words, the "suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system." *Id.* That is this case.

The decision below to the contrary—refusing to recognize any due process violation absent a showing of discriminatory purpose—is in conflict with decisions of the Second and Tenth Circuits. Both courts recognized the "substantial due process concerns" raised by the manipulation of case assignment processes in criminal cases. *See Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir.), *cert. denied*, 543 U.S. 872 (2004); *United States v. Pearson*, 203 F.3d 1243, 1253-54, 1257 (10th Cir. 2000). Both *Pearson* and *Francolino* involved situations in which the government influenced the selection of the judge for a criminal case. In *Francolino*, the Second Circuit specifically observed that allegations of government manipulation of case assignments raise significant due process concerns. *See* 365 F.3d at 141 ("We agree with the District Court that a criminal justice system in which the prosecutor alone is able to select the judge of his choice to preside at trial, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge."). Similarly in

Pearson, the Tenth Circuit suggested that the manipulation of otherwise neutral case assignment rules implicates due process concerns that must be examined. *See* 203 F.3d at 1259 (observing "prosecutorial judge-shopping may violate the Due Process Clause").

In like manner, two state courts have concluded that judicial assignment systems allowing prosecutors to select the judge or venue for a particular case violate due process. In *Louisiana v. Simpson*, 551 So. 2d 1303 (La. 1989), the Louisiana Supreme Court held that "[t]o meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court *which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.*" *Id.* at 1304 (emphasis added) (citing *Turner v. Louisiana*, 379 U.S. 466 (1965)). Here, the government was able to pick a more favorable forum through the inclusion of contrived allegations irrelevant to the charged crime (after all, the government does not dispute that the overt acts were not an element of the Hobbs Act conspiracy, *see* U.S. 9th Cir. Br. 22).[3] So too, in an earlier decision, a New York state court took a similar approach. In *McDonald v. Goldstein*, 83 N.Y.S. 2d 620, *aff'd*, 273 A.D. 649 (N.Y. App. 1948),

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[3] Nor can it. While the conduct of a co-conspirator may be sufficient to permit venue, the conduct of a third party who is not a co-conspirator cannot. *See, e.g., United States v. Angotti*, 105 F.3d 539, 545 (9th Cir. 1997).

the court rejected a district attorney's challenge to an order divesting his office of its long-accepted authority to select judges for criminal cases, relying on general principles of due process. *See id.* at 625.

Here, the government's use of pretextual allegations to maneuver Mr. McDonald's case into Orange County raises structural constitutional concerns. Although Petitioner was charged and tried in Orange County, his alleged co-conspirator, Councilman Manuel Ontal, was charged and tried for the *same alleged extortion scheme* in the Western Division. E.R. 26, 33. The government specifically noted that Councilman Ontal's case was related to a previous case in the Western Division, thereby ensuring it would be tried there, while at the same time it failed to file that standard notice in this case. *See* E.R. 28-30, 33-35, 121.

The government has never explained this glaring discrepancy. And the government never denied that it made misstatements to the district court in the course of opposing Mr. McDonald's request to be tried in his home county. *See* U.S. 9th Cir. Br. 30. The prosecutors told the district court that without the faxing of "rate information," the "defendant would not have been able to accomplish his criminal design." E.R. 29-30. That was not true. There was no evidence presented at trial even suggesting that the faxing of rate information played an essential role (or, for that matter, *any* role) in the Carson City Council decision that formed the basis for the government's charge. *See* E.R. 97, 103; U.S.E.R. 1690-92. Finally, to this day, the government has offered no explanation for its decision to try Petitioner in Orange County.

The apparent manipulation of the case assignment system raises heightened due process concerns because it ensured that Mr. McDonald, a popular and respected African-American politician from Los Angeles, would be tried before an Orange County jury with no African-Americans. As Judge Posner observed in *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995), addressing a closely-related issue, "race is special in the Supreme Court's thinking about criminal procedure. This is not an inference. It is what the Court has said." *Id.* at 442 (citing *United States v. Mechanik*, 475 U.S. 66, 70 & n.1 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam); *Rose v. Mitchell*, 443 U.S. 545, 550-59 (1979)). For example, challenges to the composition of the grand jury are usually moot if the defendant is convicted. However, in *Vasquez*, this Court held that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Vasquez*, 474 U.S. at 263-64 (citing *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Sheppard v. Maxwell*, 384 U.S. 333, 351-352 (1966)).

Race is different. Where race may be the motivating factor for jury gerrymandering, the structural constitutional implications are profound and call for searching judicial scrutiny. Indeed, this very issue was presented to the Court in *Mallett v. Missouri*, 494 U.S. 1009 (1990), in which three Justices dissented from denial of certiorari. In his dissenting opinion, Justice Thurgood Marshall argued that the Court should finally decide "whether a trial court's decision to transfer a ... trial of an Afro-American defendant to a county with no

residents of the defendant's race violate" the Constitution. *Id.* at 1009. Justice Marshall reasoned that "[j]ust as ... prosecutors may not use peremptory challenges to exclude members of the defendant's race from the jury, *Batson v. Kentucky*, 476 U.S. 79 (1986), ... trial courts may not transfer venue of the trial to accomplish the same result by another means." *Id.* That issue is presented again here.

In the wake of this Court's declining to intervene in *Mallett*, the lower courts have divided on this issue. Like the panel below, the Eighth Circuit has rejected the argument that the *Batson* analysis should be applied to venue selection in assessing due process violations. *See Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998). By contrast, two state courts have applied the *Batson* framework to claims such as this. *See New Mexico v. House*, 978 P.2d 967, 993-94 (N.M. 1999); *Osmulski v. Becze*, 638 N.E.2d 828, 832-34 (Ind. Ct. App. 1994). These courts have held that use of a venue provision to transfer a trial from one location to another may create a *prima facie* case of discrimination, where the effect of the transfer results in a significantly reduce percentage of minorities on the jury pool. *See Osmulski*, 638 N.E. 2d at 834 (holding use of venue provision "effectively operat[ed] as strikes against every potential African-American juror"); *House*, 978 P.2d at 994.

In this case, Mr. McDonald is a member of a "cognizable racial group." The government's decision to try him in Orange County rather than Los Angeles County had the effect of virtually ensuring the absence of African-American jurors. And there is evidence that the government manipulated the

court's rules, treating Mr. McDonald differently from his alleged co-conspirator in the venue decision. Applying the *Batson* framework, Mr. McDonald need only raise an inference of discrimination to establish a *prima facie* case of discrimination. He has plainly done so. The burden then shifts to the government to justify its actions with a neutral explanation, which it repeatedly has failed to provide.

In sum, like a *Batson* error, the government's manipulation of criminal case assignment rules to obtain a jury pool with virtually no African-Americans "casts doubt on the integrity of the judicial process," *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (internal quotation omitted), and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation omitted). Because this case arises on direct appeal, it presents an exceptionally good vehicle for the Court to address the conflicting case law among the lower courts and to clarify the constitutional limitations on prosecutorial manipulation of the case assignment system, as well as the applicability of *Batson* to that analysis where, as here, issues of race are implicated by the sharp differences in the jury pools.

II. The Ninth Circuit Violated Fundamental Principles Of Due Process By Sustaining A Conviction Based On Jury Instructions That Omitted The Key Element Of The Alleged Crime.

Petitioner was convicted of conspiracy to commit extortion based on a fundamentally flawed instruction that permitted the Orange County jury to find him guilty based solely on a finding of extortion

or bribery *by his co-conspirators*. Put differently, the jury instructions permitted Petitioner to be convicted based solely on the premise that the Carson City Council members (Petitioner's alleged co-conspirators) agreed to accept money *from Mr. McDonald*, rather than an innocent third party. *See* E.R. 173. However, the well-settled law of conspiracy requires more. The object of the conspiracy must be to unlawfully obtain money from *another person outside the conspiracy*. A defendant "could not have conspired to extort money from himself." *United States v. Frega*, 179 F.3d 793, 808 n.19 (9th Cir. 1999). Notably, the government does not contend otherwise, expressly conceding that the disputed jury instruction was not "a model of clarity." U.S. 9th Cir. Br. 32. On appeal, the Ninth Circuit agreed, holding that "[t]he challenged instruction that listed the elements of the offense *omitted a critical word: 'another.'*" App. 3a (emphasis added).

That should have been the end of the matter. It is well settled that the Due Process Clause precludes conviction where the government has not proven each and every element of the charged offense. *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). Jury instructions that relieve the prosecutor "of this burden violate a defendant's due process rights." *Id.* Thus, where a jury instruction would permit a conviction on a legally impermissible basis, the conviction must be reversed even if the jury might have convicted for a permissible reason. *See Yates v. United States,* 354 U.S. 298, 312 (1957). Where, as here, the jury instruction omitted an admittedly "critical" element, App. 3a, the courts of appeals have uniformly required vacature of the

defendant's conviction unless the prosecution can demonstrate that the omission is otherwise harmless. *See, e.g.*, *United States v. Dobson*, 419 F.3d 231 (3d Cir. 2005); *Parker v. Secretary for Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003), *cert. denied*, 540 U.S. 1222 (2004); *United States v. Mora*, 15 Fed. Appx. 98 (4th Cir. 2001); *United States v. Escobar-de Jesus*, 187 F.3d 148 (1st Cir. 1999); *United States v. Laughlin*, 26 F.3d 1523 (10th Cir. 1994); *Cole v. Young*, 817 F.2d 412 (7th Cir. 1987); *United States v. Voss*, 787 F.2d 393 (8th Cir. 1986); *Batiste v. Blackburn*, 786 F.2d 704 (5th Cir. 1986); *Glenn v. Dallman*, 686 F.2d 418 (6th Cir. 1982); *United States v. Howard*, 506 F.2d 1131 (2d Cir. 1974); *Byrd v. United States*, 342 F.2d 939 (D.C. Cir. 1965). The departure from this well-settled practice by Judges Pregerson, Alarcón, and Bright, implicates serious due process concerns and warrants this Court's review. Indeed, given the clarity of this issue and the uniformity of the courts of appeals, the Court may also wish to consider summary reversal.

Contrary to the panel decision below, it makes no difference that the jury was also instructed on the substantive crime of extortion. The panel reasoned that because the court defined "'extortion under color of official right' 'to require that the money or thing of value come from 'another,' ... it [was] unlikely that the jury was misled." App. 3a. But in this case, *the substantive crime of extortion only applied to Mr. McDonald's alleged co-conspirators.* Although "[b]ribery is committed by both the bribe giver and recipient," "extortion is only committed by the recipient." *United States v. Aguon*, 851 F.2d 1158, 1167 (9th Cir. 1988) (en banc), *rev'd on other grounds*, *Evans v. United States*, 504 U.S. 255 (1992);

see also United States v. Saadey, 393 F.3d 669, 676 (6th Cir. 2005) (holding private individual cannot be convicted of extortion under the Hobbs Act); *United States v. Tomblin*, 46 F.3d 1369, 1383 (5th Cir. 1995) (same); *United States v. Garcia*, 938 F.2d 12, 14 (2d Cir. 1991) (noting distinction between bribery and extortion); *United States v. Tillem*, 906 F.2d 814, 822 (2d Cir. 1990) (same).

Put differently, although a private citizen may be convicted of conspiring to commit extortion under color of official right by entering into an agreement with a public official to extort money from a third party in exchange for an official act, he may not be convicted of the extortion itself. For purposes of the conspiracy charged, Mr. McDonald was a "private citizen"—he was not charged with extorting under official color of right. Rather, the alleged co-conspirators, the Carson City Council members, were the individuals allegedly committing extortion under official color of right.

Thus, the unrelated extortion instruction could have in no way clarified or saved the fundamentally flawed conspiracy instruction.[4] Because Mr. McDonald was convicted based on jury instructions that denied his due process right to have the government prove each element of the alleged crime, the Ninth Circuit's departure from settled law calls for this Court's intervention.

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[4] Indeed, given that Mr. McDonald was charged with acting under color of official right *in other counts*, the instruction only served to further confuse the jury.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. Given the clarity of the second issue presented and the uniformity of the decisions of the courts of appeals with respect to that issue, the Court may also consider summarily reversing and ordering the Ninth Circuit to vacate the conspiracy conviction.

Respectfully submitted,

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September 27, 2006

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NOT FOR PUBLICATION

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
RODERICK KEITH MCDONALD, a/k/a Keith McDonald, Defendant-Appellant.
No. 05-50128

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding.
D.C. No. CR-03-00175-AHS.

Argued and Submitted April 5, 2006
[FILED Apr 25, 2006, Cathy A. Catterson, Clerk]
Pasadena, California

MEMORANDUM*

Before: BRIGHT,** PREGERSON, and, ALARCÓN Circuit Judges.

Roderick Keith McDonald appeals from the judgment and the District Court's sentencing decision entered following his conviction by a jury for mail fraud depriving the public of the right of honest services of a public official, 18 U.S.C. §§ 1341 and 1346,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

bribery concerning government receiving federal funds, 18 U.S.C. § 666, conspiracy to commit extortion under color of official right, 18 U.S.C. § 1951, and money laundering, aiding and abetting, 18 U.S.C. § 956(a)(1)(B)(i). He argues that (1) the denial of his motion to transfer the trial of this matter to the Western Division of the Central District of California violated the District Court's General Order 95-2 regarding venue of criminal cases and his right to due process; (2) the jury instructions regarding his conspiracy conviction were flawed; (3) the evidence was insufficient to convict him of money laundering; (4) the evidence was insufficient to convict him of mail fraud; and (5) the District Court erroneously grouped his convictions in determining the sentencing range under the Sentencing Guidelines. We affirm.

I

Mr. McDonald argues that holding his trial in the Southern Division of the Central District of California violated the District Court's General Order 95-2. We review a denial of a motion to transfer venue for abuse of discretion. *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997).

We need not determine whether the denial of the motion violated General Order 95-2 because Mr. McDonald has failed to demonstrate that he was prejudiced by the denial of his motion. *Cf. United States v. Berberian*, 851 F.2d 236, 240 (9th Cir. 1988) ("Retrial for violation of local rules on assignment of judges is not warranted unless the [defendant] can show prejudice.").

Regarding his due process claim, Mr. McDonald has failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the

Southern Division. *See Etsitty*, 130 F.3d at 425 ("In the absence of factual support in the record, assertions made in briefs simply do not suffice."). Additionally, he did not raise his claim properly in the District Court. *See United States v. Bushyhead*, 270 F.3d 905, 910 n. 2 (9th Cir. 2001) (regarding the appellant's claim that the venue in which he was tried lacked Native American voters, stating, "[n]ot only does [defendant] seek to make this argument for the first time on appeal, he also seeks to support it with an affidavit prepared while this case was on appeal. Because this argument was not timely raised and supported, we do not consider it.").

II

Mr. McDonald also contends that the jury instructions for the conspiracy to commit extortion charge failed to specify that the defendant must have taken money from "another person" outside of the conspiracy. The District Court's instructions to the jury regarding the elements of a crime are reviewed *de novo. United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004).

We conclude that taken as a whole, the jury instructions were not misleading. *United States v. Moore*, 109 F.3d 1456, 1465 (9th Cir. 1997) (en banc). The challenged instruction that listed the elements of the offense omitted a critical word: "another." Later on, however, the court defined "extortion under color of official right" "to require that the money or thing of value come from 'another.'" In light of these instructions, it is unlikely that the jury was misled.

III

Mr. McDonald further argues that the Government failed to offer sufficient proof that he engaged in money laundering and mail fraud. "Claims of insufficient evidence are reviewed *de novo.*" *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004). A conviction is supported by sufficient evidence if, "viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Weber*, 320 F.3d 1047, 1050 (9th Cir. 2003).

Mr. McDonald's conviction for money laundering was supported by sufficient evidence. He argues that the payments deposited with Business Affairs Management ("BAM") from Luster National were not proceeds from prior, separate criminal activity. Nevertheless, the Government produced evidence that the payments made to BAM were the proceeds of Mr. McDonald's solicitation of a bribe from Luster National. *See United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (concluding that "proceeds of specified unlawful activity" element was satisfied when completed act of fraud precipitated transfer of funds).

Mr. McDonald maintains that the Government failed to prove that he was trying to conceal the source of the payment. He submits that one of the checks BAM sent him contained a notation that it was from Luster National. The record shows that the Government met its burden. It produced evidence that Mr. McDonald instructed BAM to issue him a false 1099 attributing the payments to consulting fees.

IV

Mr. McDonald's conviction for mail fraud was also supported by sufficient evidence. He argues that the Government failed to prove that his decision making on the Water District Board was affected by the campaign contribution at issue and that a violation of state disclosure law cannot form the basis of a federal prosecution for mail fraud. The Government does not have to prove that Mr. McDonald's decision making was affected by the campaign contribution. "A public official's non-disclosure of material information has ... been held to satisfy the fraud element." *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980). Here, Mr. McDonald failed to disclose the true source of the campaign contribution. That the duty to disclose the source of the contribution arose from state law does not preclude its forming the basis of a scheme to defraud. *See United States v. Washington*, 688 F.2d 953 (5th Cir. 1982) (holding that a violation of state law may be relevant to whether the mail fraud statute was violated). In addition to violating state law, Mr. McDonald instructed Laura Chao to create a fake invoice for Ocean Sky's receipt of the payment, and to issue him an IRS 1099 falsely indicating that the payment was for Mr. McDonald's consulting services. This is sufficient to demonstrate a scheme to defraud.

V

Mr. McDonald contends that the District Court should have grouped his conviction for conspiracy to commit extortion with the remaining counts of conviction. A defendant's overall sentence is reviewed for reasonableness. *United States v. Jennings*, 439 F.3d 604, 607 (9th Cir. 2006). "[W]ithin the reasonableness inquiry the district court's

interpretation of the Sentencing Guidelines is a question of law which is subject to de novo review, while factual determinations made in the course of applying the guidelines are reviewed for clear error." *Id.* (internal quotations and citations omitted).

Section 3D1.2 of the Sentencing Guidelines states that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." "Counts involve substantially the same harm within the meaning of this rule ... [w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." The District Court did not clearly error in concluding that Mr. McDonald's conviction for conspiracy to commit extortion did not involve the same victim as his other convictions. Transportation Concepts was a victim of the conspiracy, but not the remaining counts. The sentence Mr. McDonald received was reasonable.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RODERICK KEITH MCDONALD, a/k/a Keith McDonald, *Defendant-Appellant.*	No. 05-50128 DC No. CR-03-00175-AHS Central District of California, Santa Ana ORDER

[FILED Jun 21, 2006, Cathy A. Catterson, Clerk]

Before: BRIGHT,* PREGERSON, and, ALARCÓN Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Pregerson has voted to deny the petition for rehearing en banc. Judge Bright and Judge Alarcón recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

No. 06-440

In the Supreme Court of the United States

RODERICK KEITH MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of petitioner's motion to transfer his trial to a different division of the district court violated petitioner's right to due process.

2. Whether the district court's jury instructions regarding conspiracy to commit extortion were erroneous.

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In the Supreme Court of the United States

No. 06-440

RODERICK KEITH MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted in 178 Fed. Appx. 643. The orders of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2006. A petition for rehearing was denied on June 21, 2006 (Pet. App. 7a). On September 12, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 19, 2006, and the petition was filed on September 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Central District of California of four counts of mail fraud with the intent to deprive the public of the right of honest services of a public official, in violation of 18 U.S.C. 1341 (2000 & Supp. III 2003) and 18 U.S.C. 1346; two counts of bribery concerning a government receiving federal funds, in violation of 18 U.S.C. 666; one count of conspiracy to commit extortion under color of official right, in violation of 18 U.S.C. 1951; and three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 41 months of imprisonment, to be followed by a three-year term of supervised release. He was also fined $25,000 and ordered to pay $20,000 in restitution. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioner was a publicly elected director of the West Basin Municipal Water District (WBMWD), a public agency that provides water and wastewater services to approximately 900,000 residents in Los Angeles County. Pet. E.R. 1.

a. In 1999, Transportation Concepts, a transportation service company located in Irvine, California, which is in Orange County, sought to renew its busing contract with the city of Carson, California. Upon learning that Carson was not going to exercise the five-year extension provision in its current contract but rather was going to solicit bids, Transportation Concepts met with petitioner about hiring him as a consultant. At a second meeting, petitioner stated that his fee would be a percentage of the value of the approximately $5 million contract. Transportation Concepts and petitioner did not then

enter into an agreement. Gov't E.R. 858-864; Gov't C.A. Br. 5-6.

In January 2000, Transportation Concepts learned that Carson had ranked it third among three finalists for the contract. Transportation Concepts thus returned to petitioner and asked for advice. Petitioner demanded a $120,000 contingency fee if Transportation Concepts received the contract, and Transportation Concepts retained him. Petitioner had already, however, begun conspiring with several members of the Carson City Council to award the contract to Transportation Concepts. Specifically, before January 2000, petitioner promised to pay $5000 each to Carson's mayor and two city council members in exchange for their votes on behalf of Transportation Concepts. On January 18, 2000, Transportation Concepts was awarded the busing contract. Petitioner paid money to the mayor and two city council members after the vote. Gov't E.R. 858-909, 926-1035; Gov't C.A. Br. 5-8.

b. In 2001, petitioner asked Laura Chao of Ocean Sky Group, Limited, a California company formed to make investments in China, to launder a $100,000 campaign contribution he had received. Petitioner gave Chao a $100,000 cashier's check written to Ocean Sky. Chao then purchased from her bank a cashier's check in the same amount, written to petitioner. Petitioner instructed Chao to create a phony invoice to account for Ocean Sky's receipt of the $100,000 cashier's check, and told Chao to issue him a 1099 tax form for the payment, falsely indicating that he was an independent contractor for Ocean Sky. To hide the source of the $100,000 political contribution, petitioner falsely stated on a California Fair Political Practices form that the source of the income was Ocean Sky and that it was paid to him for his

work as a consultant. Gov't E.R. 602-615, 1799-1804; Gov't C.A. Br. 11-12.

c. In 2001 and 2002, petitioner arranged for Luster National, Inc. (Luster) to secure a contract with WBMWD to build a pipeline in Carson without having to face a competitive bidding process. After arranging for Luster to receive the contract, petitioner told Luster's owner that he had to pay petitioner ten percent of the $5 million that was to be paid to Luster for the project. Per petitioner's instructions, Luster sent checks for $10,000, $5000, and $5000 to a company called Business Affairs Management. Business Affairs Management then wrote checks in the same amounts to petitioner and issued 1099 tax forms falsely indicating that the money it had received from Luster represented wages to petitioner for his work as an independent contractor. Gov't E.R. 315-328, 570-584; Gov't C.A. Br. 8-11.

2. On July 30, 2003, a federal grand jury in the Central District of California returned an indictment charging petitioner with ten counts of honest services mail fraud, in violation of 18 U.S.C. 1341 (2000 & Supp. III 2003), and 18 U.S.C. 1346; five counts of bribery, in violation of 18 U.S.C. 666; one count of conspiracy to commit extortion under color of official right, in violation of 18 U.S.C. 1951; and five counts of money laundering and aiding and abetting, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 18 U.S.C. 2. Pet. E.R. 1-23. The government filed the case in the Southern Division of the Central District, which encompasses Orange County, rather than in the Western Division, which includes Los Angeles County. Central District General Order 95-2 governs the assignment of criminal cases among its three divisions and states that "[a] criminal indictment or information may be assigned to the Southern Division

if at least one of the crimes charged, or any part thereof, is alleged to have been committed within the Southern Division." Gov't E.R. 1735A. The indictment alleged that the Hobbs Act extortion conspiracy took place in "Orange and Los Angeles counties." Pet. E.R. 18, para. 41. That count, Count 16, listed two overt acts involving Transportation Concepts—the faxing of bus rate information to petitioner and the drafting of the "consulting" agreement with petitioner—that occurred in Irvine, California, which is in the Southern Division. *Id.* at paras. 47, 51.

Before trial, petitioner filed a motion seeking a transfer from the Southern Division to the Western Division, claiming that such a transfer was mandated by General Order 95-2 because no part of the alleged crimes occurred in the Southern Division or, in the alternative, the district court should transfer the case as a matter of its discretion. See Gov't E.R. 1736-1743. On November 24, 2003, after a hearing, the district court denied petitioner's motion. The court found from the face of the indictment that at least part of one of the charged crimes was alleged to have occurred in the Southern Division. In addition, the court found that assignment of the case to the Southern Division was "certainly not done arbitrarily" and that "[t]here [wa]s a reason for filing it here." *Id.* at 1, 26.

At trial, petitioner submitted proposed instructions on the extortion conspiracy count stating that "the members of the conspiracy conspired to obtain money from another person or entity" (Pet. E.R. 150) and that "[i]t is not possible for a person to be part of a conspiracy to extort himself" (*id.* at 151). The district court rejected petitioner's proposed instructions and instructed the jury that in order to convict petitioner of conspiracy to

extort under color of official right, the government must prove that "there was an agreement between two or more persons to commit extortion under color of official right" and that "defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it." Gov't E.R. 1452-1453. The court further instructed that the government must prove the following elements:

> First, a co-conspirator was a Carson City Councilmember; [s]econd, the defendant or a co-conspirator intended to obtain money which defendant or a co-conspirator knew defendant or a co-conspirator was not entitled to; [t]hird, the defendant or a co-conspirator knew that the money would be given in return for taking some official action; and [f]ourth, commerce or the movement of an article or commodity in commerce from one state to another would have been affected in some way.

Pet. E.R. 173; see Gov't E.R. 1454. The court also later instructed the jury that "[t]he phrase 'extortion under color of official right' means a person's use of the power and authority of the public office he occupies to obtain money or something of value from another to which that person is not entitled." *Id.* at 1455.

On October 21, 2004, after two and a half weeks of trial, the jury convicted petitioner of four counts of honest services mail fraud, two counts of bribery, one count of conspiracy to commit extortion under color of official right, and three counts of money laundering. The jury acquitted petitioner of one count of honest services mail fraud and two counts of bribery, and failed to reach verdicts on the remaining counts. Docket entry No. 85 (Oct. 21, 2004).

Post-trial, on November 2, 2004, petitioner filed a motion for a new trial, renewing his claim that he was tried in the Southern Division in violation of General Order 95-2, and asserting for the first time that his trial thus violated his due process rights. Gov't E.R. 1805-1810. The motion claimed that the government acted arbitrarily and capriciously in "shoehorn[ing] the case into Orange County" by the way it phrased the allegations in the indictment. *Id.* at 1809. The motion made no claim of racial discrimination. On December 13, 2004, after a hearing, the district court denied petitioner's motion, finding that petitioner had shown neither a "capricious application" of the General Order nor an effect on his substantial rights. Pet. E.R. 181-182.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-6a. First, the court held that petitioner failed to show that he was prejudiced by the denial of his motion to transfer venue. *Id.* at 2a. Moreover, the court concluded that petitioner "ha[d] failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division," and thus his due process claim also failed. *Id.* at 2a-3a. The court further observed that petitioner "did not raise his claim properly in the District Court." *Id.* at 3a.

Second, the court held that, taken as a whole, the district court's jury instructions regarding the extortion conspiracy count were not misleading. Pet. App. 3a. Specifically, while the challenged instruction omitted the word "another," the district court later defined "extor-

tion under color of official right" to "require that the money or thing of value come from 'another.'" *Ibid.*[1]

ARGUMENT

1. Petitioner challenges (Pet. 12-18) the assignment of his trial to the Southern Division of the Central District of California on due process grounds, alleging that the government "manipulate[d] the case assignment system" to charge him in "a jurisdiction in which the jury pool is predominately white." Pet. at 12. Petitioner's claim lacks merit and further review by this Court of the court of appeals' unpublished decision is unwarranted.

a. The assignment of petitioner's case to the Southern Division complied with the district court's General Order governing division assignments, and the district court found no arbitrary or capricious application of the provisions of the General Order. Gov't E.R. 26. Count 16 of the indictment, which charged petitioner with conspiracy to commit extortion under color of official right, alleged that two overt acts in furtherance of the conspiracy occurred in the Southern Division. See Pet. E.R. 17-18, para. 41 (alleging that the conspiracy in Count 16 occurred "in Orange and Los Angeles counties"). Specifically, paragraph 47 alleged that petitioner "caused a representative of Transportation Concepts in Irvine, California" (a city located in the Southern Division) to fax to petitioner rate information prepared by the bus company, and paragraph 51 alleged that "a representative of Transportation Concepts, Inc., in Irvine, Califor-

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[1] The court of appeals also rejected petitioner's claims that the evidence was insufficient to support his money laundering and mail fraud convictions and that the district court erroneously grouped his convictions in determining the applicable Sentencing Guidelines range. Pet. App. 4a-6a. Petitioner does not renew those claims in this Court.

nia, prepared a written consulting agreement that reflected [petitioner's] terms," including "payment of $60,000 to [petitioner] upon contract approval by the City of Carson and additional monthly payments of $2500 per month for a period of two years." Pet. E.R. 20, paras. 47, 51.

As the district court found, the allegation about the consulting agreement was "the more critical part" because it was the "real essence of what's alleged as far as [petitioner's] being in the middle of the whole supposed transaction here." Gov't E.R. 26. In other words, the company from which petitioner conspired to extort money is located in the Southern Division, and that company prepared, in the Southern Division, the consulting agreement meant to disguise the extortion payments. As the district court found (*id.* at 26), that is "reason for filing" the indictment in the Southern Division, and satisfies the requirement of General Order 95-2 that "at least one of the crimes charged, *or any part thereof*, is alleged to have been committed within the Southern Division." *Id.* at 1735A (emphasis added).[2]

The court of appeals also correctly concluded that the assignment did not violate petitioner's due process rights. Petitioner does not, and cannot, claim that assignment to the Southern Division deprived him of a "fair trial in a fair tribunal." *Bracy* v. *Gramley*, 520 U.S. 899, 904-905 (1997) (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975)). A defendant has no constitutional right to trial in any particular division, *United States* v.

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[2] In suggesting that Transportation Concepts' non-party status is relevant to the proper venue, petitioner misquotes the General Order as requiring that "the crimes charged, or any *party* thereof, is alleged to have been committed with the Southern Division." See Pet. 7 (emphasis added).

Etsitty, 130 F.3d 420, 425 (9th Cir. 1997) (per curiam), amended by 140 F.3d 1274 (9th Cir. 1998), cert. denied, 525 U.S. 1003 (1998), nor to have members of any particular race on his jury, *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975).

b. Petitioner argues (Pet. 13-15) that the decision below conflicts with cases holding that the manipulation of case assignment processes violates due process "absent a showing of discriminatory purpose." Putting aside that petitioner made no showing of any manipulation here, the asserted conflict is illusory. As an initial matter, all of the cases petitioner cites involve assignment of cases to a particular *judge*, not (as here) to a particular division within a judicial district. See *Francolino* v. *Kuhlman*, 365 F.3d 137, 168 (2d Cir.), cert. denied, 543 U.S. 872 (2004); *United States* v. *Pearson*, 203 F.3d 1243, 1255 (10th Cir.), cert. denied, 530 U.S. 1268 (2000); *Cruz* v. *Abbate*, 812 F.2d 571, 573-574 (9th Cir. 1987); *Louisiana* v. *Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (on rehearing) (per curiam); *McDonald* v. *Goldstein*, 83 N.Y.S. 2d 620, 622, aff'd, 273 A.D. 649 (N.Y. App. 1948). These cases rest on the principle that "judges are not fungible." *Laird* v. *Tatum*, 409 U.S. 824, 834 (1972) (memorandum of Rehnquist, J., on motion for recusal). See *Pearson*, 203 F.3d at 1255-1256 (quoting *Laird*, 409 U.S. at 834); *Francolino*, 365 F.3d at 141 (noting that "due process requires a neutral and detached judge in the first instance") (internal quotation marks omitted); *Cruz*, 812 F.2d at 573 ("The selection of a judge to preside at a criminal trial is a matter of considerable significance to the criminal defendant."). As such, the cases are, at a minimum, not directly applicable to the assignment of a case to a particular division within a district, where no "judge-shop-

ping," *Pearson*, 203 F.3d at 1259; *Francolino*, 365 F.3d at 140, is alleged to have occurred.

More importantly, the federal cases cited by petitioner (Pet. 13-14) do not support the notion that prosecutorial judge-shopping is a per se due process violation. See *Pearson*, 203 F.3d at 1263 (holding that, "even if we accept Mr. Pearson's contentions as to the prosecution's motivation in reordering the defendants' names on the superseding indictment so that the case would be assigned to Judge Belot, the assumed due process violation arising out of that conduct is not structural error and is harmless beyond a reasonable doubt");[3] *Francolino*, 365 F.3d at 141 (observing that "numerous courts of appeals have held that such judge-shopping, without more, *does not* mandate a new trial"). These cases are consistent with the other federal cases addressing the matter. See *Mallett* v. *Bowersox*, 160 F.3d 456, 460 (8th Cir. 1998) ("We also reject Mallett's argument that the change of venue procedure in this case was inherently lacking in due process."), cert. denied, 528 U.S. 853 (1999); *Sinito* v. *United States*, 750 F.2d 512, 515 (6th Cir. 1984) ("Even when there is an error in the process by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the defendant is not denied due

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[3] Although petitioner asserts (Pet. 13-14) that "the Tenth Circuit suggested that the manipulation of otherwise neutral case assignment rules implicates due process concerns that must be examined," the *Pearson* court expressly declined to decide whether due process was implicated: "we have assumed, *without deciding*, that the Due Process Clause of the Fifth Amendment entitles Mr. Pearson to an impartial method of assigning his case to a particular judge." *Pearson*, 203 F.3d at 1266-1267 (emphasis added).

process as a result of the error unless he can point to some resulting prejudice.").

Nor do petitioner's state cases (Pet. 14-15) support a per se rule. In *Simpson*, the court held, on a "prospective" basis only, 551 So. 2d at 1305, that a system that vests district attorneys "with power to choose the judge to whom a particular case [wa]s assigned" violates due process. *Id.* at 1304. The court did not hold, however, that the prosecutor's selection of the judge or venue mandates reversal of a conviction absent a showing of prejudice. Indeed, Louisiana courts have applied harmless error analysis in such situations. See *Louisiana* v. *Huls*, 676 So. 2d 160, 167-168 (La. Ct. App. 1996) (applying harmless error analysis and affirming conviction even though the case assignment system violated due process under the holding in *Simpson*); *Louisiana* v. *Romero*, 552 So. 2d 45, 49 (La. Ct. App. 1989) (same). Likewise, although the state court in *McDonald* rejected a district attorney's challenge to a court order divesting his office of its long-accepted authority to select judges for criminal cases—because "[c]ourts must be independent and free from outside supervision, especially by any of the litigants"—the court's holding rested on state law. 83 N.Y.S. 2d at 625. The court did not hold that venue or judge selection by the prosecutor inherently violates due process principles of the federal Constitution. *Id.* at 625-626. As the Tenth Circuit observed, "the state court cases—*Simpson* and *McDonald*—although containing sweeping language about the impropriety of allowing prosecutors to select judges," do not address the situation of "the alleged manipulation of the case assignment system in an individual case and the contention that a conviction should be overturned because of that manipulation." *Pearson*, 203 F.3d at 1259.

c. Petitioner contends that this case raises "heightened structural constitutional concerns," Pet. 2, because "[t]he government's decision to try him in Orange County rather than Los Angeles County had the effect of virtually ensuring the absence of African-American jurors." Pet. 17. Petitioner further asserts (Pet. 18) that the framework that this Court prescribed in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), for determining whether peremptory challenges in the petit jury selection process were racially motivated should be applied to determine whether the selection of venue was racially motivated. Petitioner claims (Pet. 18) that under that framework he "need only raise an inference of discrimination to establish a *prima facie* case of discrimination," which he claims he has done.

While under the equal protection component of the Fifth Amendment's Due Process Clause prosecutorial decisions may not be based on race, the presumption of regularity supports prosecutorial decisions, in the absence of "clear evidence to the contrary." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). In related contexts, this Court has held that to establish a violation of equal protection, the defendant must show that the prosecutor's act both was motivated by a discriminatory purpose and had a discriminatory effect. See *ibid.*; *McCleskey* v. *Kemp*, 481 U.S. 279, 292 (1987) (to prove that the State's death penalty statute violates the Equal Protection Clause, defendant must prove that "the decisionmakers in *his* case acted with discriminatory purpose" and that this purposeful discrimination had a discriminatory effect on him); *Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (same with respect to a selective prosecution claim). Here, petitioner cites no evidence of a discriminatory purpose on the part of the government

in indicting him in the Southern Division, nor any evidence of discriminatory effect on him from being tried in that division. Indeed, petitioner did not even assert a claim of racial discrimination until appeal. Moreover, based on the claims that petitioner did make in the district court, the court found that "[t]here [wa]s a reason for filing" the indictment in the Southern Division (namely, that "critical" aspects going to the "essence" of the Hobbs Act extortion conspiracy were alleged to have occurred there), Gov't E.R. 26, and that petitioner had shown neither a "capricious" application of the General Order nor an effect on his substantial rights. Pet. E.R. 181-182.[4]

Petitioner asserts that the lower courts are divided over whether discriminatory purpose in venue selection can be determined using the *Batson* framework. Pet. 17 (citing *Mallett*, 160 F.3d 456); *New Mexico* v. *House*, 978 P.2d 967, 993-994 (N.M.), cert. denied, 528 U.S. 894 (1999); *Osmulski* v. *Becze*, 638 N.E.2d 828, 832-834 (Ind.

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[4] Petitioner's purported evidence (Pet. 15) of manipulation is that Manuel Ontal, a former Carson City Council member, "was charged and tried for the *same alleged extortion scheme* in the Western Division." Unlike petitioner, however, Ontal was not charged with conspiracy, but was charged with and pleaded guilty to a substantive violation of the Hobbs Act for taking a $5000 payoff in exchange for his vote on the bus contract; the payoff occurred in Los Angeles County. Gov't E.R. 1767-1768. Because Ontal was charged with a substantive violation of the Hobbs Act rather than a conspiracy, the information in his case did not allege the overt acts alleged in paragraphs 47 and 51 of petitioner's indictment (or indeed any overt acts at all), and thus he was not subject to trial in the Southern Division. In addition, contrary to petitioner's assertions (Pet. 15), the government introduced evidence at petitioner's trial of the overt acts in the Southern Division and the nexus of the conspiracy to that Division, and stood by its statements to the district court with respect to those allegations. See Gov't E.R. 1816-1818; Gov't C.A. Br. 30.

Ct. App. 1994)). Again, there is no conflict warranting this Court's review. All of the federal courts that have considered the issue have agreed that *Batson* is not applicable in these circumstances. See *Mallett*, 160 F.3d at 460 (refusing to apply *Batson* to a claim involving "the transfer of a black defendant's criminal case to a county with no black residents"); *Epps* v. *Iowa*, 901 F.2d 1481, 1483 (8th Cir. 1990) (noting the lack of "any authority to support a conclusion" that a "change of venue to a county with such a small black population that there was virtually no chance that any black persons would be included on the venire" violated the defendant's right to equal protection); *Wallace* v. *Price*, No. 99-231, 2002 WL 31180963, at *54 (W.D. Pa. Oct. 1, 2002) (observing that the *Batson* Court "never once suggested that its holding applied in cases where the trial court changed venire from one county to another"); *Goins* v. *Angelone*, 52 F. Supp. 2d 638, 666 (E.D. Va. 1999) (noting, in rejecting an ineffective-assistance claim, that "courts have held that a change of venue to a locality with a venire that includes few or no minorities does not violate a black defendant's constitutional rights"). In one of the two state cases cited by petitioner, the court observed that there was "little jurisprudence" on the potential application of venire and petit jury principles to the selection of venue, *House*, 978 P.2d at 993, and it "adapted" a "modified" *Batson* test to determine whether the venue selection in that case was discriminatory, *id.* at 993-994. The court ultimately found no evidence of discriminatory intent or effect, observing that "the mere statistical measure of a venue's ethnic proportions cannot, by itself, lead to the presumption that a person of a given race will be unable to receive a fair trial in that venue." *Id.* at 995. Only in *Osmulski* did the court conclude that the *Batson* frame-

work directly applies to the venue-transfer situation. 638 N.E.2d at 833. That lone decision from a state intermediate appellate court does not give rise to a conflict in authority warranting resolution by this Court. The Court denied review in both *Mallett* and *House*, and there is no reason for a different result here.

In any event, this case is not an appropriate vehicle for resolving whether the *Batson* framework applies to claims of racial discrimination in venue selection because petitioner did not properly preserve that claim. Petitioner did not raise a due process claim with respect to venue selection until after his trial, and he did not make a claim based on racial discrimination until his appeal. See pp. 6-7, *supra*. As a result, no factual record was developed in the trial court regarding petitioner's present racial-discrimination claim, much less did the trial court consider whether the *Batson* framework should apply in this context. Although the court of appeals' unpublished per curiam opinion could be said to have passed on petitioner's racial-discrimination claim, it did so only briefly and on the grounds that petitioner had "failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division," and that petitioner "did not raise his claim properly in the District Court." Pet. App. 2a-3a.

2. Petitioner also challenges (Pet. 18-21) the district court's jury instructions on Count 16, conspiracy to commit extortion under color of official right. Petitioner contends that the instructions did not make sufficiently clear that he could not be convicted of extortion under color of official right if he merely paid the corrupt City Council members in exchange for their votes, without having obtained the money from Transportation Concepts. Those facts would establish only bribery, peti-

tioner contends, not extortion under color of official right.

When faced with an ambiguous jury instruction that allegedly eliminated an element of the offense, "the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton* v. *McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (internal quotation marks omitted) (quoting *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991)). "It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72.

As the court of appeals held (Pet. App. 3a), in the context of the instructions as a whole and the entire trial, it is not reasonably likely that the jury misunderstood the requirements of the extortion conspiracy. The district court instructed the jury that in order to convict defendant of Count 16, the evidence must prove that "defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it." Gov't E.R. 1453. The indictment charged only one object of the conspiracy: "for [petitioner] to obtain money from Transportation Concepts and to offer a portion of this money to coconspirators [City Council members] Fajardo, Sweeney and Ontal in exchange for their votes to award the Carson bus contract to Transportation Concepts." Pet. E.R. 18-19. Thus, the instructions as a whole required the jury to find that petitioner entered into an agreement with the corrupt City Council members to extort money from Transportation Concepts.

Furthermore, the government's evidence was directed at the theory that petitioner entered into an agr-

eement with the Carson City Council members to extort money from Transportation Concepts. The government never relied on the position that the jury could convict petitioner of Count 16 if the evidence showed that petitioner paid monies obtained from another source. See *Boyd* v. *California*, 494 U.S. 370, 383 (1990) (arguably ambiguous instruction, when considered in context of proceedings and evidence presented, did not pose reasonable likelihood that jurors would misinterpret instructions). The government adduced evidence that even before he was officially retained as a "consultant" for Transportation Concepts, petitioner conspired with members of the Carson City Council to extort a bus company in connection with the transportation contract. Council member Manual Ontal testified that before voting on the bus contract, he entered into an agreement with petitioner to vote for the contractor who would pay money. Gov't E.R. 1026-1027. Similarly, Councilman Darryl Sweeney testified that petitioner stated that after he received half of the $120,000 payment from Transportation Concepts, he would give $5000 to each of the co-conspirator council members. Many weeks after the vote, Sweeney testified, he was in fact paid his $5000 share of Transportation Concepts's payment, and the delay was because petitioner had not yet been paid by Transportation Concepts. *Id.* at 981-984. Accordingly, in light of the instructions as a whole and the trial record, there is no reasonable likelihood that the jury was misled that it could convict petitioner based on the premise that the Carson City Council members agreed to accept money from petitioner rather than from Transportation Concepts. The court of appeals' determination to that effect, in an unpublished opinion, warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 06-440

IN THE

Supreme Court of the United States

RODERICK KEITH MCDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Both issues presented by this case warrant this Court's review. By manipulating case assignment procedures to bring about a racially non-diverse jury pool, the government effectively denied petitioner, a prominent and well-respected African-American public official, a jury of his peers. The Ninth Circuit's blinking at these racial gerrymandering tactics deepens a divide among the lower courts regarding the balance between due process rights and prosecutorial discretion, squarely presenting an issue ripe for this Court's review. The court compounded the manifest injustice meted out to petitioner when it allowed to stand a conviction based on a jury instruction that omitted a critical element of the crime charged. This Court's intervention is thus doubly needed. Indeed, the conspiracy conviction is so palpably improper that the Court may wish to consider summary reversal.

ARGUMENT

1. The Ninth Circuit's decision permits prosecutors to gerrymander an African-American defendant's case into a forum where the government is assured of obtaining a predominantly white jury pool. In the Twenty-first Century, this should not be. The decision below violates fundamental principles of due process and conflicts with the decisions of numerous lower courts.

a. In defending the Ninth Circuit's decision on the merits, respondent contends that a presumption of regularity supports prosecutorial decisions absent clear evidence that the prosecutor's act was both motivated by a discriminatory purpose and had a discriminatory effect. Br. in Opp. 13-14. The law, however, is not nearly so clear. To the contrary, state courts have held that when alleging discriminatory intent in connection with venue selection, a defendant need only raise an inference of discrimination to establish a *prima facie* case under the framework prescribed by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), whereas the Eighth Circuit

has held the opposite. *Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998).

Respondent nevertheless argues that there is no conflict warranting this Court's review. Br. in Opp. 14-16. Yet, respondent concedes that in *Osmulski v. Becze,*, 638 N.E. 2d 828, 832-834 (Ind. Ct. App. 1994), the court "conclude[d] that the *Batson* framework *directly applies* to the venue-transfer situation." Br. in Opp. 15-16 (emphasis added) (citing to *Osmulski*, 638 N.E.2d at 833). Respondent attempts to distinguish *New Mexico v. House*, 978 P.2d 967 (N.M.), *cert. denied*, 529 U.S. 894 (1999), on the grounds (i) that the court observed there was "little jurisprudence" on principles to be applied to the selection of venue; (ii) that the court adopted a "modified" *Batson* test to determine whether venue selection was discriminatory; and (iii) that the court ultimately found no evidence of discriminatory intent or effect. Br. in Opp. 15-16. Those purported distinctions fail to diminish the direct *Batson*-driven conflict among the courts.

First, the so-called "modified" *Batson* test applied in *House* involves the *same* analysis for venue selection as would apply to peremptory challenges: (i) the defendant must make out a *prima facie* case of racial discrimination in the State's motion to select a particular venue; (ii) the State must present a race-neutral explanation; and (iii) once a race-neutral explanation is advanced, the trial court must resolve whether the defendant has proven intentional racial discrimination. *House*, 978 P.2d at 994-95. These steps are *identical* to those articulated by this Court in *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam), describing the appropriate procedure for evaluating peremptory challenges under *Batson*.

Second, the ultimate result in *House* stems from the government's having come forward with *plausible* race-neutral explanations, in stark contrast to the absence of any such explanations in the case at hand. In *House*, the State articulated several race-neutral explanations for

changing venue, including the fact that the selected venue "had not been subjected to the frequent, pervasive, contemporaneous, and highly prejudicial publicity regarding the case." *House*, 978 P.2d at 994. The selected venue also "had a much larger population than the small close-knit community of [the original venue] and would be less likely to be tainted by the prejudicial publicity." *Id.* While the court deemed those justifications "plausible," *id.*, the government's reasons for maneuvering Mr. McDonald's case into Orange County are emphatically not.

Respondent concedes that at most *three* paragraphs of the fifty-seven paragraph indictment even mention Orange County. Br. in Opp. 8-9. The contention that those paragraphs described "overt acts" that were "critical" to proving the charged crime, *id.*, is contrary both to the law and to the record. An overt act is not an element of a conspiracy under 18 U.S.C. § 1951 (a). *See* United States Court of Appeals for the Ninth Circuit, Manual of Model Criminal Jury Instructions § 8.16; *United States v. Pistone*, 177 F.3d 957 (11th Cir. 1999)(per curiam); *United States v. LiCausi*, 167 F.3d 36, 46 (1st Cir. 1999); *United States v. Maldonado-Rivera*, 922 F.2d 934, 983 (2d Cir. 1990). Respondent conceded before the Ninth Circuit, as required by the record, *see e.g.*, E.R. 100-103, that the allegations relating to the Southern Division merely described non-criminal business activities of a non-party who was not an alleged member of the conspiracy. *See* U.S. 9th Cir. Br. 21-22. Respondent's representation that Mr. McDonald was indicted in the Southern Division because the allegations relating to that division were "critical" to proving the conspiracy charge does not, and cannot, account for why Mr. McDonald's alleged co-conspirators were indicted in the Western Division.

Third, the *House* court's observation that it found "little jurisprudence" on the issue of evaluating discriminatory intent in venue selection illustrates why

resolution by this Court is warranted. In *House*, the court explicitly recognized that the defendant was "echoing Justice Marshall's dissent [from denial of *certiorari*] in *Mallett v. Missouri*," 978 P.2d at 993 (citing *Mallett*, 494 U.S. 1009 (1990) (Marshall, J., dissenting)), and proceeded to utilize the *Batson* test. This case marks the third time this Court has been asked to take up this issue and guide lower courts faced with allegations of racially motivated venue selection.

b. Refusing to apply the *Batson* framework to race-based case assignments results in a perverse anomaly. When prosecutors eliminate jurors of a particular race one by one, defendants need only establish a *prima facie* case of discrimination; yet, defendants must prove discriminatory purpose and effect when the government engages in *wholesale exclusion* of members of a race by manipulating venue into a particular forum. Indeed, even when noting its lack of awareness of "any authority to support a conclusion" that an African-American defendant's constitutional rights were violated by a change of venue, the Eighth Circuit nevertheless declared itself "troubled by the state trial court's decision" to change venue to such a county. *Epps v. Iowa*, 901 F.2d 1481, 1483 (8th Cir. 1990).

In the seventeen years since racially-motivated jury gerrymandering was first presented to the Court in *Mallett v. Missouri*, Justice Thurgood Marshall's impassioned arguments have been augmented by the profound split between federal courts (*see Mallett*, 160 F.3d at 460; *Epps*, 901 F.2d at 1483; *Wallace v. Price*, No. 99-231, 2002 WL 31180963, at *54 (W.D. Pa. Oct. 1, 2002) (noting that the *Batson* Court did not suggest its holding would apply to venue transfers)) and state courts (*House*, 978 P.2d at 993-94; *Osmulski*, 638 N.E.2d at 832-34). This case — involving an African-American public official who was the sole defendant among his alleged co-conspirators to be placed on trial in a forum virtually devoid of African-American jurors — provides the Court

with an opportunity to resolve the issue whether the *Batson* framework applies to analysis of prosecutorial manipulation of the case assignment system when race issues are implicated.

c. Respondent's assertion that the claim was not properly preserved for this Court's review, Br. in Opp. 16, is belied by the record. The Ninth Circuit considered petitioner's *Batson* claim and rejected it, holding that petitioner "failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division" *Id.* There are no facts in dispute, and the record is fully adequate to allow this Court to decide whether the *Batson* framework applies to venue selection. The issue was both pressed to and passed on by the Ninth Circuit and is thus ripe for review by this Court. *See United States v. Williams*, 504 U.S. 36, 41-42 (1992).

d. Respondent argues that the conflict identified by petitioner is illusory. Br. in Opp. 10-12. Respondent rests on the unsteady ground that neither the federal nor state cases cited by petitioner squarely hold that judge-shopping is a *per se* due process violation. *Id.* at 11-12. This contention fundamentally misses the import of the due process implications discussed in those cases. In light of the "special" nature of race in this Court's criminal procedure jurisprudence, *see Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995) (citing to *United States v. Mechanick*, 475 U.S. 66, 70 & n.1 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam) *Rose v. Mitchell* 443 U.S. 545, 550-59 (1979)), judicial scrutiny of racial gerrymandering should be no less searching than that afforded to race-neutral judge-shopping.

Respondent acknowledges that in *Louisiana v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (on rehearing) (per curiam), the court held — without reservation — that a procedure vesting district attorneys with power to

choose the judge to whom a particular case is assigned violates due process. Br. in Opp. 12. Similarly, the Seventh Circuit observed that a law permitting federal prosecutors to "designate the federal district judge to preside in criminal cases" would "raise *profound* issues under the due process clause." *Tyson*, 50 F.3d at 438 (emphasis added). Nor does respondent dispute that in *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000), the Tenth Circuit recognized that prosecutorial judge-shopping may violate the Due Process Clause. *Pearson*, 203 F.3d at 1259 (citing *United States v. Gallo*, 763 F.2d 1504, 1532 (6th Cir. 1985); *United States v. Erwin*, 155 F.3d 818 (6th Cir. 1998)).

Respondent is thus misguided in asserting that the Ninth Circuit's decision does not conflict with cases that have recognized due process concerns arising from prosecutorial judge-shopping. From the perspective of an African-American criminal defendant, transfer of venue to a forum where virtually no African-Americans reside poses as significant a threat to the defendant's prospects for a fair trial as the prosecution's selection of a specific trial judge within a diverse forum. The Ninth Circuit's decision to permit racial gerrymandering of Mr. McDonald's case into Orange County cannot be reconciled with other courts' expressions of due process concerns triggered by *race-neutral* judge-shopping. That the Ninth Circuit decision is unpublished neither renders the conflict less real nor serves as even an informal bar to certiorari. *See e.g., Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 60 (2000)(noting that circuit decision reviewed was unpublished); *Behrens v. Pelletier*, 516 U.S. 299, 304 (1996)(same).

2. Respondent urges this Court to leave standing a conspiracy conviction based on an admittedly erroneous jury instruction that omitted a critical element of the alleged crime. Br. in Opp. 16-17 While the other Circuits are in accord that when a jury instruction omits an

element, vacatur is required by the Due Process Clause (unless the error is otherwise harmless), the Ninth Circuit idiosyncratically declined to vacate. The panel based its decision solely on the inclusion of an instruction relating to the substantive crime of extortion under color of official right — a crime that applied not to Mr. McDonald but to his co-conspirators.

Respondent relies on three cases in which ambiguous jury instructions were deemed not to warrant reversal — but in none of those cases did the instructions omit an element of the crime charged. To the contrary, the instructions in those cases related to the explanation of defenses or the weight of the evidence. *See Middleton v. McNeil*, 541 U.S. 433 (2004) (per curiam) (direct review of ambiguous instruction regarding the affirmative defense of "imperfect self defense"); *Estelle v. McGuire*, 502 U.S. 62 (1991)(habeas review of instructions related to the operation of the California Evidence Code); *Boyde v. California*, 494 U.S. 370 (1990) (habeas review of instructions regarding the mitigating evidence to be considered at sentencing).

Respondent urges that the prosecution did not rely on an impermissible theory in presenting its case and that the indictment accurately presented the charge. But this misses the point. It is the content of the jury instruction that matters for purposes of the Due Process Clause's requirement that the government prove each element of the crime charged. Here, the conspiracy instruction unconstitutionally relieved the prosecution of the burden of proving a critical element of the crime charged: that petitioner *extorted* money "from another", in this case, Transportation Concepts — i.e., that Transportation Concepts knew it was paying money in return for official acts rather than paying money to petitioner pursuant to a legitimate services contract. Where such a flawed jury instruction would permit conviction on a legally impermissible basis, the conviction should be reversed, even where the jury might have convicted for a

permissible reason. *See Yates v. United States*, 354 U.S. 298, 312 (1957). The Ninth Circuit's radical departure from settled law calls for this Court's intervention.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant the petition for certiorari. The Court may wish to consider summary reversal with respect to the conspiracy conviction.

Respectfully submitted,

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